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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 IN RE: ACCENT DELIGHT
4 INTERNATIONAL LTD., XITRANS
FINANCE LTD. ,

16 MC 125 (JMF)

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7 New York, N.Y.
8 May 31, 2016
11:06 a.m.

9 Before:

10 HON. JESSE M. FURMAN

11 District Judge

12 APPEARANCES

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(In open court; case called)

THE COURT: Good morning to all of you. I should note by way of background that Mr. Levy and Mr. Asner were both colleagues of mine at the U.S. Attorney's Office. I don't see any reason why I can't preside over this matter but I do want to make sure everyone knows that. With that, let's get into where things stand.

As I mentioned, I am going to grant the intervenor's motion to intervene as unopposed and substantially for the reasons set forth in their memorandum of law that's docket number 21 at pages 12 to 13. That is the easy part.

Then we have the 1782 motion itself and connected to that the proposed orders between petitioners and Sotheby's. Let me tell you where I stand on those and then give all sides an opportunity to be heard.

First I am inclined to grant the application with respect to the two Picasso paintings at issue in the Paris proceedings. Indeed, I don't really read the intervenor's memorandum to be opposing that, though perhaps that's wrong and Mr. Levy can clarify. But I am inclined to grant the application but only to that extent at the present time.

Other than that, I am inclined to stay the motion and by extension defer signing either of the proposed orders in connection with the agreement between petitioners and Sotheby's pending either or both a resolution of the pending appeal or

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1 appeal issues in the Singapore proceedings or further
2 clarification of the status of the Monaco proceedings from the
3 investigating magistrate there on the ground that whether the
4 use requirement, the for use requirement can be met with
5 respect to either of those proceedings may turn on either the
6 outcome of the forum non conveniens litigation or clarification
7 of the status of the petitioners in the Monaco proceedings.

8 I do not think that the Paris proceeding, which would
9 presumably be unaffected by any decision in Singapore, provides
10 a basis for broader discovery than with respect to the two
11 paintings that are already discussed largely, in my view, by
12 virtue of the Second Circuit's decision in the *Certain Fund v.*
13 *KPMG* case; all of which is to say that, to the extent that
14 petitioners are entitled to broader discovery, my inclination
15 is to think that it probably would be worth waiting further
16 developments in either or both the Singapore proceeding or the
17 Monaco proceeding.

18 So that's sort of just by way of background as to
19 where I stand at the moment and my current inclinations. I
20 want to emphasize that they are just inclinations at this point
21 and in that regard I may change my view and will certainly
22 listen to your arguments as to whether and to what extent I
23 should.

24 Let me turn first to you, Mr. Kornstein, since it is
25 your motion and ask you: Number one, what the harm would be in

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1 proceeding in the way I described; namely, staying and
2 deferring decision on broader discovery until after things play
3 out in Singapore or Monaco.

4 I should also ask, since it seems like there are
5 developments in this case in real time and things were --
6 briefing was taking place, I don't know if there's any further
7 updates since the most recent submission, but if there are you
8 should let me know that as well.

9 MR. KORNSTEIN: Thank you, your Honor.

10 I think the reasons your Honor --

11 THE COURT: Just make sure you speak directly into the
12 microphone. The acoustics in here are not great. I just want
13 to make sure that everyone can hear you.

14 Go ahead.

15 MR. KORNSTEIN: Very well, your Honor.

16 I think the reasons your Honor gave are actually
17 reasons to grant the discovery. Because things are happening
18 in the other foreign proceedings that's why the discovery is
19 needed.

20 In Monaco, I think, your Honor is referring, because
21 it was the only issue raised by the intervenors, that they
22 questioned whether the petitioners needed to withdraw the case
23 entirely from Monaco, which was a criminal case, rather than
24 just saying that they were withdrawing the civil claims for
25 damages.

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1 They have withdrawn their claim for money damages.
2 The Singapore court has said that that satisfies the condition
3 for the denial of the forum non conveniens motion and the
4 Monaco case is proceeding. That's a criminal case.

5 And under the Monaco law the complainant, who is a
6 civil party, can participate in that case; can provide
7 information, can work with the prosecutor, the investigating
8 magistrate. That's what's happening here.

9 THE COURT: Let me ask you: First, assuming that you
10 remain parties to the Monaco proceedings in the extent to which
11 you are currently a party to those proceedings, is it correct
12 that under Monaco -- or there was some adjective used for
13 Monaco.

14 MR. KORNSTEIN: Monégasque.

15 THE COURT: Which was new to me, and an interesting
16 thing to learn in this briefing. Under Monégasque law, is it
17 correct that you can inject the evidence that you would get in
18 connection with the discovery here into those proceedings even
19 if you're not technically prosecuting the proceedings?

20 MR. KORNSTEIN: The answer is yes.

21 The use of the word "inject" is one of those words
22 that has many connotations unto it. You can, as a complaining
23 party, as a civil party, give the evidence to the prosecutor,
24 can participate in the process, have access to the criminal
25 file. It's almost as if it's a co-party to the litigation.

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1 So the answer to your Honor is yes even though it may
2 be that as a civil party you are not the one presenting
3 evidence but, as the cases make clear, it's not simply the
4 matter of presenting evidence in court that is the limited
5 scope of for use.

6 THE COURT: No. But there is a spectrum here, right.
7 And I agree with you that it doesn't rise to the level of
8 giving you procedural rights to present evidence in court and
9 certainly the Second Circuit has made clear that the
10 admissibility of the evidence is not something that I should be
11 considering in this context.

12 The other end of the spectrum, or at least somewhere
13 along that spectrum, the Second Circuit in *Certain Fund v. KPMG*
14 says that merely -- essentially the ability to merely give
15 evidence to a prosecutor or to an investigating magistrate with
16 the hope that it might be used in the proceeding is not enough
17 to satisfy the for use requirement.

18 Why is it not there on the spectrum as opposed to
19 closer to the four use end of the spectrum?

20 MR. KORNSTEIN: Another case, *Berlamont*, talks about
21 being able to supply information in a criminal case as this
22 kind of civil party use because of the role of the civil party
23 in a criminal case in Monaco. It is not, like here, where
24 you're just a victim and you supply evidence that may or may
25 not be used. It is actually being a co-party with the

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1 investigating magistrate, with the court. It is participating
2 in the investigation. It is helping the investigation, not
3 simply a matter of giving information in the hope that it might
4 be used.

5 THE COURT: Is there some procedural mechanism under
6 Monégasque law that allows you in the posture you're currently
7 in to make use of the evidence in a way that is different than
8 just simply passing it along to the investigating magistrate
9 with the hope that it will be used.

10 MR. KORNSTEIN: My understanding is yes because there
11 is almost a collaboration between the civil party in this
12 criminal case and the prosecutor itself.

13 THE COURT: Let me backup and just clarify one thing
14 that I think is a threshold consideration here which is my
15 understanding, and correct me if I'm wrong, about the posture
16 of the Monégasque proceedings -- now that I know that word I
17 will use it as much as I can -- is that the magistrate there --
18 well, that you presented letters to the investigating
19 magistrate essentially withdrawing any claims for damages or
20 something akin to that, and that the Singapore court has said
21 that that satisfies them, but that the last word from the
22 investigating magistrate in Monaco was that in his view -- I
23 think it's a he -- that that might not suffice; that complete
24 discontinuance pursuant to Article 79 of the code of criminal
25 procedure might be required.

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1 Am I correct that that's the last word on this issue
2 from the investigating magistrate, in which case I guess the
3 question I have is: Why not await clarification from the
4 magistrate as to whether he is satisfied with the Singapore --
5 the fact that the Singapore courts don't need you to go any
6 further than you have gone?

7 MR. KORNSTEIN: You are correct that that is the last
8 word from the investigative magistrate in Monaco. But the
9 sequence of the letters is significant as well as current
10 developments.

11 The first letter, which was earlier in April,
12 notifying the investigating magistrate that the civil claims
13 damages was being withdrawn, perhaps was ambiguous or unclear.
14 That was the one that the investigating magistrate wrote back
15 to and said what he said about full discontinuance under
16 Article 79.

17 But then the counsel in Monaco for the petitioners
18 wrote back and clarified exactly what the position was. And
19 the investigating magistrate -- that was April 15. The
20 investigating magistrate has not written back.

21 On May 4 the Singapore court said, yes, that satisfied
22 the condition as far as Singapore was concerned. And the
23 Monaco magistrate may have nothing else to say about it in
24 terms of satisfying the Singapore condition.

25 THE COURT: He may not but I guess the question I

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1 have, going back to my initial inclination, is why not await
2 further word from him and why not wait for him to respond to,
3 it sounds like the most recent letter, saying this is -- or I
4 don't know if there's a letter that informs him that the
5 Singapore courts are satisfied with how far you've gone, and
6 get confirmation from him that as far as he's concerned you
7 remain parties with whatever rights under Monégasque law you're
8 entitled to assert.

9 MR. KORNSTEIN: Your Honor, the last letter was sent
10 April 15 so it's already a month-and-a-half.

11 THE COURT: So why haven't you updated him about the
12 Singapore court's views on this since they're unchanged as of
13 May 4. No?

14 MR. KORNSTEIN: I suppose the situation is happy the
15 way it is as far as our people are concerned; that everybody
16 has stated their position, the Monégasque magistrate has not
17 said anything differently. The case is proceeding in Monaco.

18 THE COURT: Answer my first question which is: What's
19 the prejudice from staying my decision on your motion pending
20 further clarification either through the Singapore litigation
21 or through some sort of further word from the Monaco
22 magistrate?

23 MR. KORNSTEIN: The passage of time by itself is
24 prejudicial. The information that we seek would have been very
25 useful even earlier in all of the cases, as your Honor knows.

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1 Your Honor had an opportunity to read the decision in Singapore
2 and so on. They were talking about merits, talking about the
3 facts. The information that we're seeking here is core
4 information that so far has been withheld by Mr. Bouvier.

5 THE COURT: But I assume we're talking about a mere
6 matter of weeks or possibly at most months, correct?

7 MR. KORNSTEIN: Hopefully even sooner.

8 THE COURT: Okay. So is there any harm in waiting
9 weeks -- weeks or months?

10 MR. KORNSTEIN: Just more time going by without
11 acquiring the information. And as far as we're concerned the
12 situation is clarified.

13 THE COURT: I understand. But I'm not inclined to
14 think that at the moment.

15 What's your expectation or understanding of how long
16 it would take the Singapore court to decide whether to grant
17 leave to appeal the forum non conveniens decision?

18 MR. KORNSTEIN: That is less clear to me. Though what
19 happened, Bouvier and his colleagues made a motion to stay
20 combined with a forum non conveniens motion. That was denied
21 in March. They made a motion for leave to appeal. That was
22 denied on May 4. They have now made another motion for leave
23 to appeal to the next higher court. That is pending. And
24 Mr. Bouvier has made a motion to stay his requirement to file
25 what would be analogous to our answer, hasn't even answered in

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1 the case yet because of the stall tactics.

2 I don't know the precise answer to your question as to
3 when the decision on the motion for leave to appeal currently
4 pending, which is including the stay, would be made. There is
5 no stay now.

6 THE COURT: That is my other question, which is: What
7 does that mean? My understanding is that there was an
8 application for a stay, and this is from I think the
9 intervenor's reply brief, that there was an application for an
10 interim stay that it was put off -- it was scheduled for May 20
11 but that the Singapore court put it off for scheduling reasons
12 and that in the meantime there was an agreement that the
13 intervenors didn't need to answer and essentially there is a
14 sort of temporary stay pending the application for an interim
15 stay.

16 So do you know when that will be heard, how quickly
17 that will be decided; and if the application for a stay is
18 denied, does that mean, as it would be here, that the
19 litigation will proceed in the trial court even as the leave to
20 appeal is adjudicated?

21 MR. KORNSTEIN: That's my understanding, your Honor,
22 as you stated it.

23 One other factor. Yesterday there was a hearing in
24 Singapore about a different issue as to whether the case should
25 be transferred to a Singapore International Commercial Court.

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1 Bouvier opposed that even being considered. The judge decided
2 to put off that question pending the outcome of the motion for
3 leave to appeal and motion for the interim stay. I wanted to
4 inform the court about that. It just happened.

5 THE COURT: Does that just pertain to what court the
6 case will proceed in if it proceeds in Singapore at all?

7 MR. KORNSTEIN: Correct.

8 THE COURT: Does that have any bearing on my --

9 MR. KORNSTEIN: No. But I wanted to disclose it so
10 you heard it from me and it's out there.

11 THE COURT: Okay. Anything else you want to say?
12 Otherwise, I'll turn to Mr. Levy.

13 I think your colleague wants you to look at the
14 Post-It.

15 MR. KORNSTEIN: The other aspect of for use is it can
16 be used by counsel in preparing cases. That's within the scope
17 of the for use definition. And certainly regardless of whether
18 there's an actual stay or not, whether the case is proceeding
19 quickly or not, whether it can be used in court or not, it's
20 important, just as part of an attorney's utility in the
21 toolbox, it's part of the work product, to help plan the case.
22 This is a litigation brought on several fronts. And the
23 information we're being -- we're trying to get and which one of
24 the respondents has agreed to produce should make it a little
25 bit easy for the court to rule on that.

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1 THE COURT: Wet it doesn't necessarily make it easier
2 for me to decide whether you've met the statutory requirements
3 which I do. My problem with that argument, and I will give you
4 an opportunity to respond, is twofold. One is the principle
5 that pending litigation needs to just be in reasonable
6 contemplation comes from the Supreme's Court decision in *Intel*.
7 I think there it was in the context of a discussion about
8 essentially what types of proceedings qualify as foreign
9 proceedings not necessarily what qualifies as use. And my
10 concern is that extending it to what qualifies as use, that it
11 just simply be something that a lawyer may find helpful in
12 foreign litigation in some inchoate respect would basically
13 read the for use requirement out of the statute and make it
14 available in almost any proceeding.

15 Second, in *KPMG*, the *Certain Funds v. KPMG* decision,
16 the Second Circuit separated its discussion of the pending
17 foreign proceedings was one section of the opinion, and then in
18 the second section of the opinion it discussed contemplated
19 proceedings basically proceedings that have not yet been
20 initiated. And I read that, at least implicitly, as
21 essentially saying that those are two different categories
22 altogether and that in reasonable contemplation isn't the
23 standard to use with respect to current pending litigation.
24 And in that regard it's not enough with respect to pending
25 litigation for a lawyer simply to say that we might be able to

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1 put this to use.

2 What's your answer to both of those points?

3 MR. KORNSTEIN: We have a situation where all of the
4 foreign proceedings exist and are ongoing so it's not
5 reasonably contemplated. We don't need to get there.

6 I don't think the reasonable contemplation standard
7 was meant to say with existing foreign proceedings how the
8 lawyer would use that. I thought that was applying to a
9 proceeding that was reasonably contemplated, not the use.

10 THE COURT: That's my point.

11 My point is that it doesn't apply to the use. And
12 with respect to the use in pending current proceedings you need
13 to show the ability to inject it into those proceedings. And
14 right now there is sufficient question about whether you can,
15 given the ongoing litigation on forum non conveniens grounds in
16 Singapore and given the uncertainty about your status in the
17 Monégasque proceedings. That's my point.

18 So I'm not sure that pointing to or that reliance on
19 the cases about the fact that there doesn't even need to be a
20 proceeding gets you very far. I see those cases as sort of in
21 a different box altogether. That's my point.

22 MR. KORNSTEIN: I think part of the problem is the use
23 of the word, primary use of the word inject. Inject may carry
24 a connotation more direct and more severe than what for use
25 actually means. And I think, as the cases say, it was a term

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1 or phrase used in the case but it means used for the case, used
2 in the case, injected. It doesn't have a legal meaning. It's
3 not like admit into evidence. It's not like put into a motion.
4 It really means just useful for the case.

5 What we're talking about is core information here.
6 We're not talking about things on the periphery.

7 THE COURT: Thank you.

8 Mr. Levy.

9 MR. LEVY: Yes, your Honor.

10 Just a few things. I think your Honor hit the nail on
11 the head when you used the phrase from KPMG concerning
12 injecting information into the proceedings. I don't think
13 there is -- when there is litigation already pending, I don't
14 think assisting counsel in conducting an investigation is what
15 the Second Circuit meant when they used the phrase inject into
16 the proceeding with some advantage.

17 I did want to comment on a couple of things that
18 Mr. Kornstein mentioned in his colloquy with the court.

19 Your Honor asked about whether the Singapore judge's
20 decision to not transfer the case to the Singapore
21 International Commercial Court had any bearing. I think it
22 does because what -- the effect that it has is that the case
23 with respect to the merits, is not before any court at this
24 time. The judge in Singapore held on to the case. And once
25 leave to appeal has been decided, then she will decide whether

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1 to transfer it to the International Commercial Court or not.

2 At this point the merits are not being litigated and that's the
3 primary goal of counsel's -- excuse me, of petitioner's
4 application.

5 THE COURT: Let me ask you a couple of questions.

6 First, am I right that you don't really oppose the
7 motion with respect to the two Picasso paintings at issue in
8 the Paris proceedings; is that correct?

9 I know you take the view that Sotheby's may not have
10 any responsive materials with respect to those two paintings.
11 That's a separate issue.

12 MR. LEVY: I think on this one Mr. Asner has confirmed
13 for us, the intervenors, that they have the one e-mail that
14 Mr. Kornstein attached to his application; and if that's all
15 that the court has -- excuse me, if the court has only -- is
16 only intending to order that the documents that Sotheby's has
17 with respect to those two Picasso pictures be produced, then we
18 would not object subject to some conditions about how it can be
19 used. We have put in, in our briefs some discussion about the
20 limits that we think it should be used for. And we submit that
21 it should only be used for the proceedings for which it was
22 obtained. It should not be used for other proceedings,
23 potential proceedings to be brought. We submit that that's
24 beyond the scope of 1782 in this context.

25 THE COURT: Okay. Next question is do you agree that

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1 if the forum non conveniens issue is resolved against you, that
2 is to say that Singapore court denies leave to appeal, the
3 denial of the forum non conveniens motion, then the case will
4 proceed in Singapore, in whatever court it will proceed, that
5 the Singapore proceedings would satisfy the statutory
6 requirements of 1782?

7 MR. LEVY: The Singapore proceedings we believe would
8 likely satisfy the statute. The question is sort of what is
9 the posture in which the litigation is going to be continue.
10 We don't know. There's a substantial amount of uncertainty.
11 But I think --

12 THE COURT: But I would -- it's a very straightforward
13 question. Right now the motion to dismiss on forum non
14 conveniens ground was denied, correct?

15 MR. LEVY: The motion to dismiss was denied and
16 Mr. Bouvier and MEI have sought leave to appeal. And that
17 application is pending before the court of appeal in Singapore.

18 THE COURT: And if that motion is denied then the case
19 would proceed in Singapore?

20 MR. LEVY: Then the case would proceed in Singapore.
21 And there are very liberal rules about discovery in Singapore.
22 And it's reasonably likely that Mr. Bouvier would need to
23 produce this material without resort to 1782. He would simply
24 have to provide it. In fact, much of the information that the
25 petitioner is seeking was produced by Mr. Bouvier already under

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1 seal in Singapore. So it wouldn't be necessary because there
2 are liberal discovery rules in Singapore. And at that point it
3 may be that Mr. Bouvier himself has to provide that -- the
4 information that's within his possession.

5 THE COURT: That is relevant to the discretionary
6 factors under *Intel*. It's not relevant to the statutory
7 factors.

8 The simple question I'm asking is if the motion for
9 leave to appeal the forum non conveniens motion is denied, do
10 you concede that the statutory factors for 1782 are met?

11 MR. LEVY: May I have one moment?

12 THE COURT: Yes.

13 (Pause)

14 MR. LEVY: We submit that it -- it would satisfy the
15 statutory factors. I think the questions about the
16 discretionary factors obviously would be still substantially in
17 play in part because Mr. Bouvier has already had to produce
18 some of this information in Singapore. But it would be -- at
19 that point the merits would be joined, for lack of a better
20 term, and the parties would litigate the case in whatever court
21 the court of appeals determines that it should be litigated in.
22 It may, in fact, end up not being Singapore. It may be
23 Switzerland.

24 THE COURT: Not if the motion for leave to appeal is
25 denied.

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1 MR. LEVY: Correct.

2 THE COURT: Then it would proceed in Singapore.

3 MR. LEVY: Correct. Yes.

4 One additional caveat, of course, is that 1782, in our
5 view -- I think we've provided ample support for this -- in our
6 view only reaches documents located in the United States.

7 THE COURT: I understand.

8 My question is simply with respect to the three
9 statutory factors in 1782, just pinning you down and confirming
10 that if the motion is denied for leave to appeal, that we can
11 all agree that those three conditions are then met, and then we
12 can address whether the discretionary considerations cut in
13 your favor or against and also whether and to what extent the
14 scope needs to be limited to documents and other discovery in
15 the United States. It's just the three statutory factors.

16 And I take you as grudgingly conceding that those
17 would be met.

18 MR. LEVY: Not so grudgingly but with those
19 reservations.

20 THE COURT: Not so conceding either.

21 MR. LEVY: Touche. Yes.

22 We, at that point, whatever documents could be
23 obtained under 1782 would be for use if the merits end up
24 needing to be litigated in Singapore.

25 THE COURT: Next question for you is in the case that

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1 Judge Cote decided that both sides have addressed in their
2 briefs, am I correct that you argued that the Monaco
3 proceedings in that case, quote unquote, easily satisfied the
4 for use requirement of the statute; is that correct?

5 MR. LEVY: We did.

6 THE COURT: And that was true notwithstanding the fact
7 that there was a pending motion to dismiss in that case; is
8 that correct?

9 MR. LEVY: Yes. We did.

10 And the reason why was because Mr. Bouvier is very
11 much differently situated in the Monaco proceedings than the
12 petitioners are.

13 Also, I should point out that prior to the time that
14 the motion was heard, the motion in the Monaco court had been
15 denied. And we informed the court of that. So --

16 THE COURT: But then sought leave to appeal that
17 denial, correct?

18 MR. LEVY: No.

19 THE COURT: My understanding is --

20 MR. LEVY: It was denied by the court in Monaco.

21 THE COURT: Right. But I think then that decision,
22 the denial was then appealed to some appellate tribunal in
23 Monaco. Is that incorrect?

24 MR. LEVY: Let me just clarify with Mr. Soffer. I
25 believe it was the highest court in Monaco that denied the

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1 motion but let me just clarify with Mr. Soffer who was part of
2 those proceedings.

3 (Pause)

4 Mr. Soffer clarifies for me that it was the highest
5 court in Monaco that denied the motion. So that was the end of
6 the line of motion practice in Singapore. And it occurred
7 prior to the time that Judge Cote heard the application in this
8 court.

9 THE COURT: But after your brief had been submitted
10 saying that the for use requirement was easily satisfied
11 notwithstanding the pending motion; is that correct?

12 MR. LEVY: Correct. And that's because the
13 investigation in Monaco was ongoing and it wasn't stayed as a
14 result of the fact that there was a motion pending in the court
15 in Monaco.

16 THE COURT: So my question for you is why doesn't that
17 argument apply equally to the Singapore proceeding here since
18 there is a motion pending, the motion for leave to appeal the
19 denial of the forum non conveniens motion, but it's basically
20 pure speculation whether you'll get relief in that regard and,
21 pending that, that the case is not stayed. So why is it not
22 the same posture in Singapore that the proceedings were in
23 Monaco for your purposes before Judge Cote?

24 MR. LEVY: The merits of the case are not before the
25 court in Singapore; whereas, the investigation was ongoing in

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1 Monaco while the motion practice was occurring.

2 So Mr. Bouvier had the right to inject whatever
3 information he obtained in New York all during the entirety of
4 the proceedings in Monaco; whereas, it's quite a bit different
5 here, where the petitioners would not have the ability and do
6 not have the present ability to inject information they obtain
7 here in the proceedings in Singapore.

8 So Mr. Bouvier, for example, was on bail in Monaco
9 while the motion was pending and he could have, depending on
10 the information sought -- excuse me, depending on the
11 information obtained, sought a modification of his bail. He
12 had plenty of ability to inject the information into the
13 proceedings in Monaco while that motion was pending; whereas
14 here the petitioners don't have the ability to inject the
15 information into the proceedings in Singapore while this leave
16 to appeal decision is before the court of appeal in Singapore.

17 THE COURT: And what is your legal basis under
18 Singapore law for saying that; which is to say, my
19 understanding is that there is an interim application for a
20 stay that was scheduled to be heard on May 20 and was put off
21 for some sort of scheduling reason and, therefore, has not yet
22 been adjudicated, but I would infer from that that because
23 you're applying for a stay under Singapore law, that it follows
24 that at present there is no stay under Singapore law, which
25 presumably means, if it's similar to litigation here, that the

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1 merits are before the trial court. Whether the trial court is
2 moving the case along or not, the merits are still proceeding.
3 The trial court has not divested its jurisdiction to adjudicate
4 the merits. If that's the case, then what's the provision of
5 Singapore law that says that they cannot inject the evidence in
6 these proceedings at the moment?

7 MR. LEVY: Two things. When the parties appeared
8 before the judge of the court of appeals -- the judge who was
9 assigned to the court of appeals to hear the motion for a stay
10 pending a determination of Mr. Bouvier and MEI's leave to
11 appeal, the petitioners in Singapore appeared and they were not
12 ready to argue. So the judge there said fine, we will put this
13 off, but only upon an undertaking from you that you will not
14 seek a default judgment against Mr. Bouvier which in effect
15 stays -- and thereby granting Mr. Bouvier a stay of his
16 obligation to provide an answer. And so as a result the merits
17 cannot go forward in Singapore at this time. Mr. Bouvier has
18 not and does not intend to file an answer at this point because
19 the application for leave to appeal has not been adjudicated.

20 THE COURT: When is the application for an interim
21 stay scheduled to come back before that court?

22 MR. LEVY: I don't know when it will come back before
23 the court. I don't know if they rescheduled it.

24 What is going on, however, is that the briefing before
25 the court of appeals on leave to appeal is I believe expected

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1 to be completed this week and the -- it's at least possible
2 that the court of appeals will decide it prior to going on a
3 court holiday for the first few weeks in June. And if not
4 the -- as I understand it, the application would be heard in
5 early July.

6 So, as your Honor suggested early on, a period of
7 several weeks is not -- would not result in any meaningful
8 prejudice to petitioners given the posture of the litigation.

9 I did also want to clarify one thing that came up
10 during your Honor's colloquy with Mr. Kornstein about the
11 Monaco condition.

12 THE COURT: Before you do that though let me just pin
13 you down on this one too.

14 Assuming that the Singapore court does hear the
15 application for an interim stay -- it's sort of a peculiar
16 situation where it hasn't ruled on the stay but in the meantime
17 it's basically we're going to keep things where they are which
18 is effectively a stay, I'll give you that.

19 But assuming that that issue comes back before the
20 court and that interim application is denied, do you agree that
21 the merits are technically before the trial court in Singapore
22 whether, again, the trial court chooses to proceed with it or
23 not?

24 MR. LEVY: Technically they would be. Although I
25 think what's going to happen, as a practical matter, is that

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1 the Singapore Court of Appeals is going to decide leave to
2 appeal before there's a rescheduled argument on the application
3 for a stay pending the application for a leave to appeal.

4 THE COURT: Now, let me turn, before you get to what
5 you want to say, to the Monaco proceedings, Monégasque
6 proceedings.

7 Do you agree at the moment that the petitioners have
8 not completely withdrawn from those proceedings pursuant to
9 Article 79 of the code of criminal procedure or whatever it is;
10 that is to say that at present they remain parties in some
11 capacity even if they are no longer seeking civil damages.

12 Do you agree with that factual statement, put aside
13 whether the Monaco investigating magistrate thinks that
14 suffices, I just want to confirm that factually that is a
15 correct statement of the current status of things.

16 MR. LEVY: They have retained some subset of rights in
17 Monaco. It is unclear the nature of those rights. They are
18 disclaiming their right to seek damages and I think it's, as a
19 U.S. lawyer would see it, they are disclaiming their right to
20 seek any substantive relief in Monaco. At the same time they
21 appear to be attempting to retain some procedural rights.

22 And I think when your Honor was referring to the idea
23 of there's a spectrum, I think you hit the nail on the head
24 which is that it's a bit betwixt and between. And I think what
25 it suggests is not only that the petitioners aren't -- what

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1 they seek is not for use in Monaco. It also tends to show I
2 think that they are not interested persons any longer since
3 they have no interest, financial, in the relief sought in
4 Monaco.

5 At the end of the day, however, I think it's going to
6 happen is that the last word on whether the conditions should
7 have been imposed, that is the condition that the petitioners
8 withdraw from Monaco, is going to be decided by the court of
9 appeals in Singapore.

10 THE COURT: Okay.

11 MR. LEVY: Because plainly before the court of appeals
12 there is whether the condition should have been imposed and
13 whether what the petitioners have done satisfies that
14 condition. What the lower court judge said was they must
15 discontinue the proceedings.

16 THE COURT: I want you to assume two things. Don't
17 resist the hypothetical.

18 MR. LEVY: You know I will try.

19 THE COURT: And I won't let you, and you know that.

20 One, assume that the Singapore high court says that
21 doesn't undo that decision and says that the current
22 arrangement in Monaco, whatever it is, suffices for the
23 Singapore court's purposes, okay.

24 Number two, assume that the Monaco -- the Monégasque
25 investigating magistrate says since the Singapore courts are

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1 satisfied, I'm satisfied too and no longer require you to
2 completely discontinue under Article 79 so the current
3 arrangement is okay with me.

4 Under that current arrangement, again assuming that it
5 doesn't change, what rights, if any, do the petitioners have to
6 use evidence in that proceeding?

7 Am I correct that they do have some sort of procedural
8 right to submit evidence in that proceeding?

9 MR. LEVY: I think that they would have a procedural
10 right to submit evidence, but I don't think they would have a
11 procedural right to use -- to inject it for some advantage to
12 them.

13 THE COURT: Why not? And what's the difference
14 between --

15 MR. LEVY: Because there is no advantage that is
16 obtained by submitting the evidence. They're not seeking any
17 relief in Monaco anymore.

18 THE COURT: Why is that not contrary to the decision
19 that Mr. Kornstein cited to me, that --

20 MR. LEVY: He referred to a case, *Berlamont*. But
21 there the person who wanted to obtain the information under
22 1782 had a financial interest in the outcome of a criminal
23 proceeding; whereas here the petitioners have disclaimed all of
24 their financial interest in the outcome of the proceedings in
25 Monaco.

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1 THE COURT: But in other words if the law allows for a
2 party to -- if a party has procedural rights to provide
3 evidence in a criminal proceeding in a foreign tribunal why
4 doesn't that defeat the argument you just made that by virtue
5 of disclaiming their civil damages they're no longer, quote
6 unquote, interested persons.

7 MR. LEVY: Because the case to which Mr. Kornstein
8 referred involves a situation that we don't have here. The
9 case to which he referred involved someone who had a financial
10 interest in the outcome of a criminal proceeding; whereas here
11 the petitioners have no financial interest in the case in
12 Monaco. They have disclaimed their interest in the proceeding
13 in Monaco.

14 THE COURT: All right.

15 MR. LEVY: And I would point out that they may have to
16 withdraw completely from those proceedings depending what
17 happens in Singapore. I know your Honor knows that.

18 THE COURT: That's the resisting the hypothetical
19 part.

20 MR. LEVY: It's really just an addition to sort of
21 make sure it's clear in your mind and I know it is so I
22 appreciate the opportunity. Thank you.

23 THE COURT: It is.

24 What else do you want to tell me? Otherwise I want to
25 hear from anyone else who wishes to be heard. I also have

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1 another matter that I need to attend to in a few minutes.

2 So anything else?

3 MR. LEVY: I don't know how your Honor intends to
4 proceed if the court ultimately decides that the stray document
5 that Sotheby's has should be produced, how we want to handle
6 the question of what conditions it should be -- should be
7 associated with its use. We can handle that now or we can
8 handle that later, depending on how the court ultimately rules.

9 THE COURT: Let me see if anyone else has anything
10 they wish to say before I get to that.

11 Mr. Asner.

12 MR. ASNER: Your Honor, Marcus Asner for Sotheby's. I
13 was going to actually raise that one issue. Plainly
14 Mr. Kornstein and Mr. Levy are in a better position to advise
15 the court about the foreign proceedings. But with respect to
16 the Picasso pictures, the two pictures that are at issue in the
17 Paris proceedings, we'd be happy to produce those. I just want
18 to make sure that there's a protective order in place so
19 that -- it is Sotheby's' confidentiality that is at issue but
20 in addition we have confidentiality obligations to Mr. Bouvier.
21 Just want to make sure we're not infringing on that.

22 THE COURT: Mr. Comen, do you wish to be heard?

23 MR. COMEN: Not at this time.

24 THE COURT: Not at this time. All right. Very good.

25 Mr. Kornstein, let me turn back to you. First just

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1 ask you to respond to Mr. Levy's argument about the Monaco
2 proceedings, that by virtue of disclaiming your interest in
3 damages that you no longer qualify as an interested person even
4 if you can provide evidence to the magistrate judge.

5 MR. KORNSTEIN: It's of no moment. The lack of
6 financial interest in a criminal proceeding is not a factor in
7 the for use of interested persons analysis. *Berlamont* is not
8 the only case that talks about a complainant in a criminal
9 proceeding being entitled to 1782 discovery. The petitioners
10 are the victims. They believe there was a massive fraud that
11 caused damages. The interest in seeing justice accomplished is
12 an adequate and sufficient interest under 1782 to qualify. So
13 the fact that they may have no financial interest in terms of
14 recovering that money in that case does not in any way reduce
15 their status as an interested person in that case.

16 THE COURT: And the other cases that you alluded to,
17 are they cited in your briefs?

18 MR. KORNSTEIN: I believe they are. I will
19 doublecheck that; and if not, we will make sure that we supply
20 them to your Honor.

21 THE COURT: Okay.

22 What about Mr. Levy's argument which I think goes to
23 the discretionary factors that if the motion for leave to
24 appeal in Singapore is denied and the case proceeds there that
25 you would be entitled to this discovery in the context of that

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1 proceeding and so it's not necessary here?

2 MR. KORNSTEIN: This proceeding here is not seeking
3 discovery from Mr. Bouvier. We're seeking discovery from
4 Sotheby's and from the sellers of the da Vinci painting. So I
5 say it's irrelevant, number one.

6 Number two, while there, we understand, is discovery
7 in Singapore, that discovery would not cover Sotheby's
8 necessarily or the sellers of the da Vinci painting because
9 there is no jurisdiction over them there.

10 We're not talking about a Venn diagram matter too
11 concentric or too exactly identical circles. There are going
12 to be intersections and we're entitled to get that information.

13 A point about even the Picasso paintings. I
14 misunderstood your Honor. I thought what your Honor was
15 originally saying when you were talking at first was that the
16 request as to the scope of discovery would be allowed -- we
17 were thinking that way -- for the Paris proceeding. Because
18 that is what Mr. Bouvier, through Mr. Levy, had applied for
19 from Judge Cote. And, in fact, the discovery that they
20 obtained was about a non-Picasso painting. They got discovery
21 about a Modigliani painting, including a deposition that is not
22 one of the two Picassos. So the one e-mail from the Sotheby's
23 person is not really -- we have it already. It's not really
24 something that does anything; that, as a matter of parody, as a
25 matter of fairness, we should have the scope of the discovery

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1 that we asked for. If your Honor wants to limit it to the use
2 in the Paris proceedings, that's one thing. But I don't think
3 the scope should be narrowed. I think that's an important
4 distinction.

5 THE COURT: I think you did misunderstand me
6 because -- if I didn't make myself clear, I apologize -- but my
7 view is that the Paris proceedings alone do not support the
8 broader scope of discovery that you're seeking that they would
9 entitle you to discovery with respect to the two paintings but
10 only those two paintings.

11 I understand your arguments about the proceedings
12 before Judge Cote. I just don't read them in the same way you
13 do. I think the issue for use in that proceeding was not
14 litigated. Both sides seemed to agree that it would be for
15 use. And I think that Mr. Bouvier's admissions with respect to
16 those proceedings are fundamentally different since he's the
17 criminal defendant in those proceedings and therefore not
18 similarly situated to you.

19 In any event, I don't think the issue was litigated
20 before Judge Cote. I don't think they are estopped from taking
21 that position here. And I think I'm required to determine
22 whether the statutory factors are met. And I don't think that
23 beyond the materials that may relate to those two paintings
24 that you can satisfy the statutory factors solely with respect
25 to the Paris proceedings because there I think your status is

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1 akin to the person who would pass materials along to a
2 prosecutor that *KPMG*, the Second Circuit panel said, would not
3 suffice for the for use requirement to the statute.

4 So I guess my question is I am inclined to end where I
5 started; namely, to say that you're entitled to materials
6 relating to those two paintings but those two alone at the
7 moment and to defer decision on the broader requests pending
8 further developments either in Monaco or in Singapore.

9 I don't know if that's something that you're
10 interested in, the materials related to the two Picasso
11 paintings. It sounds like you think you may have. The only
12 things that there would be to get there, in which case it may
13 not be worth even discussing what terms and conditions need to
14 be placed upon that, and maybe we should just wait for the
15 whole thing to be resolved.

16 MR. KORNSTEIN: Your Honor, we will take what we can
17 get.

18 The one point I would like to make is that to the
19 extent that Sotheby's and petitioners have reached an
20 agreement, of course subject to your Honor's approval, that
21 should put it on a different posture -- in a different posture
22 than the application itself. Because here is an agreement
23 between parties. Sotheby's is willing to produce, subject to
24 certain conditions that we've agreed to, documents so that it
25 almost takes the 1782 analysis almost out of the question or

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1 certainly puts it on a different plane than it would be if it
2 were simply asking for your Honor to decide it in the first
3 instance. And we would argue that, please give serious
4 consideration whether that -- two orders were carefully
5 negotiated and were meant to satisfy the interests of both
6 parties can be put into effect so that those documents can be
7 produced.

8 THE COURT: All right. But, number one, those
9 documents themselves say subject to hearing any objections from
10 intervenors, and intervenors have asserted an objection.

11 Number two can you point me to any authority which
12 stands for the proposition that I don't need to concern myself
13 with whether the statutory factors are met where petitioners
14 and the relevant third party have an agreement, the third party
15 has no objection to providing the discovery but an intervenor
16 who has properly intervened does object because I am not aware
17 that that creates an exception to 1782's requirements.

18 MR. KORNSTEIN: I think the agreement between
19 Sotheby's and us to some extent makes that part of the petition
20 relating to Sotheby's unnecessary to be decided because it's
21 kind of excised out as a separate matter.

22 THE COURT: Well, I think, again, because the
23 agreement itself says subject to any objections by the
24 intervenors, that's not really true; and number two, unless you
25 can point me to authority which says that the requirements for

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1 the statute don't apply as there's a voluntary agreement on
2 behalf of the respondents, then I'm not prepared to accept
3 that.

4 Here is my inclination. I do have another matter and
5 they have been patiently waiting in the back.

6 I think I am inclined to, again, leave things where I
7 said I was in the first instance.

8 My hope is that I can leave to you to discuss the
9 terms and conditions that would apply to disclosure of the
10 materials relating to the two Picassos and that all relevant
11 parties -- that is petitioners, intervenors and Sotheby's --
12 can agree upon those terms and whether those terms are
13 equivalent to or involve my signing that proposed order or not,
14 that you all can advise me of that and otherwise advise me of
15 any disagreements and I can adjudicate those.

16 Beyond that, I think what I will do is retain
17 jurisdiction. I'm obviously hearing this in Part I, but I
18 think it doesn't make sense to pawn this off on another judge
19 who hasn't gotten up to speed on it, retain jurisdiction but
20 defer decision on the matter pending further developments in
21 either or both Singapore or Monaco when those developments can
22 include the Monaco investigating magistrate saying the
23 petitioners' current status suffices and confirming that that
24 status gives petitioners some rights to use evidence in those
25 proceedings. That update can include resolution of the

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1 application for an interim stay in Singapore, in which case
2 perhaps the matter would be proceeding on the merits in those
3 courts notwithstanding the pending application for leave to
4 appeal, or the relevant update might be denial or some ruling
5 on the leave to appeal the forum non conveniens decision. The
6 bottomline is I don't think I can make a determination of the
7 for use factor let alone the discretionary factors with all of
8 those developments unfolding and I'm inclined to defer decision
9 or I am going to defer decision until some sort of development
10 provides further clarification.

11 So that's where I'm going to leave things unless
12 anybody wants to be heard further. But I think what I'll do is
13 leave to you to discuss the terms of a proposed order for
14 disclosure of the Picasso related -- to two Picasso painting
15 related materials, give you a week to do that. And barring
16 agreement, give you until let's say next Friday to submit to me
17 a proposed order indicating in some fashion, red-lined or
18 bolded or otherwise, where there are any points of
19 disagreement. And if there is agreement within the next week,
20 you can submit a proposed order or orders to me for my
21 signature, in which case that will proceed as discussed.

22 Is there any need for deposition on that front? It
23 doesn't sound like it. All right. Mr. Kornstein is saying no.
24 So that should suffice there.

25 And otherwise I'll leave it to you -- and by next

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1 Friday I do mean June 3 just to be clear.

2 And otherwise I'll leave it to you to update me when
3 there are relevant developments in either Monaco or Singapore
4 having heard from me what I think those developments are likely
5 to be.

6 What I would propose is for one or both sides, by that
7 I mean petitioners and intervenors, to submit a letter saying
8 here is what happened. And you can propose -- and I would ask
9 you to confer with one another before proposing -- how you
10 think the matter should be handled. It may be that the current
11 briefing would suffice and I can take into consideration those
12 developments, or you may agree that further supplemental
13 briefing is in order, but make a proposal to me. And then I
14 will endorse your letter or issue an order indicating what we
15 will do from there, whether I'll direct supplemental briefing
16 or just leave it as is. All right.

17 Any questions?

18 Mr. Levy?

19 MR. LEVY: Nothing. Thank you very much.

20 THE COURT: All right. Mr. Kornstein?

21 MR. KORNSTEIN: No.

22 THE COURT: All right. Very good. Then I'll stay on
23 the bench but this matter is adjourned. Thank you.

24 (Adjourned)